INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	4
Argument	7
Conclusion	13

CITATIONS

Cases:	
Bellefield Co. v. *Heiner*, 25 F. 2d 560	11
Danville Building Ass'n v. *Pickering*, 294 Fed. 117	8
Dauphin Deposit Trust Co. v. *United States*, 80 F. 2d 893	11
Goodyear Co. v. *United States*, 273 U. S. 100	8
Lawyers' Mortgage Co. v. *Anderson*, 67 F. 2d 889	8
Statutes:	
Internal Revenue Code, Sec. 1801 (26 U. S. C. 1940 ed., Sec. 1801)	7
Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 800, Schedule A–1	12
Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 1100, Schedule A–1	12
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 800, Schedule A–1, as amended	2, 7
Miscellaneous:	
Crowell, Dictionary of Business and Finance (1923), p. 169	10
VI Lough, Corporation Finance (1914)	10
Munn, Encyclopedia of Banking and Finance (1937, Revised)	10
Treasury Regulations 71:	
Art. 12	3, 8
Art. 19	3, 8

763637—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 347

GENERAL MOTORS ACCEPTANCE CORPORATION,
PETITIONER

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 63–76) is reported in 60 F. Supp. 979. The opinion of the Circuit Court of Appeals (R. 87–94) is reported in 161 F. 2d 593.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 14, 1947. (R. 95.) On August 13, 1947, Mr. Justice Jackson signed an

order extending the time for filing a petition for certiorari until September 15, 1947. (R. 98.) The petition for a writ of certiorari was filed on September 15, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the instruments issued by the taxpayer in 1935 to evidence a loan of $25,000,000 from eight corporations were subject to the stamp tax as bonds, debentures, or certificates of indebtedness within the meaning of Title VIII, Section 800, Schedule A–1, of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII—STAMP TAXES

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * *

* * * * *

Schedule A—Stamp Taxes

1 [as amended by Section 721 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169].

Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 10 cents: * * *

* * * * *

Treasury Regulations 71 (Revised July, 1932):

ART. 12. *Instruments issued in numbers, under a trust indenture, are bonds.*—Instruments containing the essential features of a promissory note, but issued in series, secured by a trust indenture, either in registered form, or with coupons, embodying provisions for acceleration of maturity in the event of any default by the obligor, for optional registration in the case of bearer bonds, for authentication by the trustee, and in some instances for redemption before maturity, or similar provisions, are bonds within the meaning of the statute, whether called bonds, debentures, or notes.

ART. 19. *Certificates of indebtedness.*—The term "certificates of indebtedness" includes only instruments having the general character of investment securities issued by a corporation as distinguishable from instruments evidencing debts arising in ordinary transactions between individuals.

STATEMENT

The facts which were stipulated (R. 40–55) and which were based upon certain documents offered in evidence (R. 56–62), and as found by the District Court (R. 77–81) may be summarized as follows:

The taxpayer is a New York corporation whose only business is to provide financial assistance to dealers in the products of the General Motors Corporation and to their retail customers. (R. 40, 77.) In December, 1934, the board of directors passed a resolution authorizing its officers to borrow from not more than ten investors approximately $30,000,000 on its promissory notes, provided that could be done at rates and on terms which were in the judgment of the officers "to the interests of the corporation". It was also resolved that "prior to sale of such promissory notes the officers of the corporation shall obtain the authorized statement in writing of each purchaser to the effect that its purchase is for investment account and not with the view of distribution to the public". (R. 44–45.)

The instruments described above were sold pursuant to the provisions of the resolution and subject to the opinion of counsel for the investors that the purchase of the instruments or their resale would not violate the Securities and Exchange Act of 1933 or any rule or regulation promulgated thereunder. (R. 41–42, 45, 48–49, 78–80.)

The instruments in question were unsecured and were printed on tinted paper with engraved borders. They were issued in series form, designated H to K, and each bore a serial number, but they were not issued with interest coupons or in registered form. (R. 7, Ex. A; R. 54, Ex. 4; R. 78–79.) They all bore the corporate seal of the taxpayer (R. 79) and were redeemable prior to maturity date on 60 days notice at a premium of ¼ of 1% for each six months that the term was shortened (R. 50–51). Each note provided that the taxpayer would not, so long as it was outstanding "at any time pledge or otherwise subject to a lien any of its property or assets without thereby expressly securing the due and punctual payment of this note equally and ratably with any and all obligations and indebtedness secured by such pledge", with the proviso that this restriction should not apply in case of export transactions. (R. 7, Ex. A; R. 51.) The taxpayer further agreed in each note that the authentication therein required by means of the signature of its comptroller, or of some person acting in his behalf, should not be performed "unless the Corporation at the time of such authentication owns receivables, instalment payment obligations, cash or cash on deposit to its order, pledged or unpledged, in the aggregate to an amount at least equal to the total of all its obligations outstanding, secured or unsecured, including the notes and obligations then being authenti-

cated and issued", excluding any receivable or installment payment it owned or held which had been in default for longer than 60 days. (R. 7, Ex. A; R. 51–52.) There were also provisions for acceleration of payment of principal in the event of default for 30 days in any payment of interest; or of the insolvency, bankruptcy, or reorganization of the taxpayer; or of the institution of proceedings in bankruptcy or reorganization; or of an assignment for the benefit of creditors, or the appointment of a receiver of all or substantially all of the taxpayer's property. (R. 7, Ex. A; R. 52–53.)

In 1935 the taxpayer, pursuant to the resolution described above, borrowed $25,000,000 from eight corporations and delivered to them 84 unsecured instruments ranging in face amounts from $100,000 to $1,000,000. (R. 41–42, 78–80.) In some of these instruments it promised to pay the amount stated therein to the named holder and in the others to the bearer. (R. 54, Ex. 4; R. 79.) Interest was payable on all of them at designated places at intervals of six months at 3¼%, and the principal was payable on various maturity dates, none of which was less than four and one-half years nor more than five years and one month from the date of issuance. (R. 50, 54, Ex. 4; R. 80.)

The Commissioner of Internal Revenue assessed the stamp tax on these issues which amounted in the aggregate to $25,000, on the ground that they

were taxable pursuant to the provisions of Title VIII, Section 800, Schedule A–1, of the Revenue Act of 1926, as amended by Section 721 (a) of the Revenue Act of 1932.[1] (R. 80–81.)

The taxpayer paid the tax under protest to the respondent, who was the Collector of Internal Revenue for the Third District of New York, and after claim for refund had been duly filed and rejected, brought this suit in the District Court for the Southern District of New York to recover the tax so paid. (R. 81.) The case was tried by the court without a jury on stipulated facts. (R. 63, 83.) The District Court rendered judgment for the taxpayer (R. 83), which was reversed on appeal to the court below (R. 95).

ARGUMENT

The decision of the court below is correct. Title VIII, Section 800, Schedule A–1, of the Revenue Act of 1926, as amended, *supra,* provides in part that there shall be levied a tax of 10 cents for each $100 face value of all bonds, debentures, or certificates of indebtedness issued by any corporation. The instruments in the instant case to evidence a loan of $25,000,000 to eight corporations (more than $20,000,000 of which were sold to life insurance companies) (R. 54, Ex. 4) fall within at least one of those classifications. Inasmuch as the court below de-

[1] This section corresponds to Section 1801 of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 1801).

cided that the instruments were debentures within the meaning of the statute, we shall confine our discussion to that classification. With respect to whether the instruments could also properly be classified as bonds or certificates of indebtedness, see Articles 12 and 19 of Treasury Regulations 71, *supra.*

While the instruments in question were described in the corporate resolution and also on their face as notes (R. 7, Ex. A; R. 44–45), that description is not conclusive with respect to the application of Title VIII, Section 800, Schedule A–1. In applying a documentary tax, the form and terms of the instrument control in determining whether the instrument is subject to the tax. *Goodyear Co.* v. *United States,* 273 U. S. 100, 103, and cases cited; *Lawyers' Mortgage Co.* v. *Anderson,* 67 F. 2d 889, 890 (C. C. A. 2). The mere fact that the taxpayer labeled the instrument a "note" does not take it outside the provisions of the statute. See *Danville Building Ass'n* v. *Pickering,* 294 Fed. 117 (S. D. Ill.).

As to the form and terms of the instruments in this case, they were unsecured, printed on tinted paper with engraved borders. (R. 7, Ex. A; R. 78.) They were issued in series form designated H to K and each bore a serial number, but they were not issued with interest coupons nor in registered form. (R. 79.) They all bore the corporate seal of the taxpayer (R. 79) and were redeemable prior to the maturity date on 60 days

notice at a premium of ¼ of 1% for each six months between the redemption date and the maturity date (R. 50–51). Each note provided that the taxpayer would not, so long as the note was outstanding, "at any time pledge or otherwise subject to a lien any of its property or assets without thereby expressly securing the due and punctual payment of this note equally and ratably with any and all obligations and indebtedness secured by such pledge or other lien". (R. 7, Ex. A; R. 51.) The taxpayer further agreed in each note that the authentication therein required by means of the signature of its comptroller, or of some person acting in his behalf, should not be performed "unless the Corporation at the time of such authentication owns receivables, instalment payment obligations, cash or cash on deposit to its order, pledged or unpledged, in the aggregate to an amount at least equal to the total of all its obligations outstanding, secured or unsecured, including the notes and obligations then being authenticated and issued", excluding any receivable or installment payment it held or owned which had been in default for longer than 60 days. (R. 7, Ex. A; R. 51–52.) There were also provisions for acceleration of payment of principal in the event of default for over 30 days in any payment of interest; or the insolvency, bankruptcy, or reorganization of the taxpayer; or the institution of proceedings in bankruptcy or reorganization; or of an assignment for the benefit

of creditors or the appointment of a receiver of all or substantially all of the taxpayer's property. (R. 7, Ex. A; R. 52–53.)

The form of the instruments involved in the instant case and the provisions recited above show, as the court below decided (R. 90), that they were not ordinary promissory notes evidencing debts arising in the ordinary course of business. These instruments, with terms of 4½ to 5 years, by which the taxpayer obtained large sums of money from investors whose choice of investment, at least in the case of the insurance companies, was restricted and safeguarded by state statute, differ substantially from promissory notes used customarily in day to day commercial transactions of a short-term credit character. It also appears that the notes were purchased at a premium (R. 36, 61). Treasury Regulations 71, *supra,* promulgated in connection with the statute, do not expressly define the term "debentures", but according to text writers on corporate finance [2] the term has come to be restricted to a bond which is not secured by a lien upon any specific property. As the court below said in its opinion (R. 92–93):

> Similar definitions from similar sources may be added to the above but enough have been quoted, we think, to make it clear that these "notes" were well within the class of

[2] See VI Lough, Corporation Finance (1914); Crowell, Dictionary of Business and Finance (1923), p. 169; Munn, Encyclopedia of Banking and Finance (1937, Revised).

> investment instruments commonly called debentures and that the insistence of the treasury upon taxing them under the above statute was correct. Their terms, appearance, and method of sale to a comparatively few investors who were required to state at least their then present intention to hold them for investment purposes without transfer to others combined to put them in a class apart from ordinary commercial promissory notes and into the category of debentures as that term is used in the statute in its setting with bonds, and certificates of indebtedness, to designate a type of corporate securities which does not include ordinary promissory notes.

The decision of the court below is not in direct conflict with the decision of any other court. Of the seven cases cited in the petition (p. 5) as being in conflict with the decision of the court below, only two held that the instruments in question were not subject to tax and both of them differ in material respects from the instant case. In *Bellefield Co.* v. *Heiner,* 25 F. 2d 560 (C. C. A. 3), all of the instruments were given by the debtor to banks and all were payable in four months. In the instant case, 80% of the instruments were sold to life insurance companies (R. 54, Ex. 4) and the term was not less than four years and six months, and in some instances was slightly more than five years (R. 80). In *Dauphin Deposit Trust Co.* v. *United States,* 80 F. 2d 893 (C. C. A. 3), the instrument represented

assignment of a mortgage and its accompanying bond, which the court described (p. 896) as the purchase by an individual buyer of an individual debt. The Third Circuit also pointed out (p. 894) that the customer selects the particular mortgage he wishes to buy and sometimes visits and inspects the property before he buys the mortgage; and that he does not pool his purchase with anyone. In the instant case, however, there is no such personal transaction and no purchaser has specific security for his loan.

The taxpayer also argues that under the terms of the statute an instrument is not taxable unless it is issued with interest coupons or in registered form. (Pet. 5–14.) The legislative history of the statute shows that bonds, debentures, or certificates of indebtedness, whether or not issued in registered form or with coupons attached, had been taxed in Schedule A prior to 1918 in the paragraph entitled "Bonds of indebtedness:" See Section 800, Schedule A–1, Revenue Act of 1917, c. 63, 40 Stat. 300. In 1918 there was added for the first time the catch-all clause "and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities". See Section 1100, Schedule A–1, Revenue Act of 1918, c. 18, 40 Stat. 1057. As the court below said in its opinion (R. 94):

> It seems obvious that this change was not to restrict prevailing taxation but was to

add to what was already taxable all other instruments generally known as corporate securities provided those to which taxation was extended were issued with interest coupons or in registered form.

CONCLUSION

The decision of the court below is correct and there is no direct conflict of decisions. The case depends upon the form and terms of the particular instruments. The petition for certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
HELEN R. CARLOSS,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

OCTOBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947